

No. 12,314

IN THE

United States Court of Appeals
For the Ninth Circuit

MIKE ERCEG,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF OF APPELLANT.

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This is an action brought by the plaintiff against the United States of America pursuant to the provisions of Title 41, Section 113b of the United States Code, in accordance with the provisions of Title 28, Sub-Section 20, and as provided by the Judicial Code of the United States, effective September 1, 1948, Title 28, Section 1346, Sub-Division (2).

The complaint alleges that on the 17th day of July, 1942 the United States of America was constructing an army base at Big Delta, Alaska, and that, through the necessity of drilling water wells in connection with the base, the resident engineer of the War Department at said base, contracted with the plaintiff to lease drilling equipment of the plaintiff's and to pay unto

the plaintiff rental of \$30.00 per day, or \$900.00 per month, and a written agreement thereof was entered into. This action is to recover the sum of Four Thousand and Twenty Dollars (\$4,020.00) and interest resulting from unpaid rentals. The complaint further shows that the defendant administratively denied owing this sum of money on the 22nd day of January, 1949. This action was brought and service obtained upon the defendant on the 21st day of April, 1949, within ninety days after the delivery to the plaintiff of the findings of the administrative agency of the defendant. (See Marshal's Return Transcript P. 19.)

To this complaint, the defendant filed a demurrer on two grounds: first, that the Court has no jurisdiction of the subject matter of the action; and, second, that the action has not been commenced within the time limited by the laws of the Territory of Alaska. The Court overruled the demurrer of the defendant as to the first ground, but sustained on the second ground. From this order sustaining the demurrer of the defendant on the ground that the action was not commenced within the time limited by the laws of the Territory of Alaska the plaintiff brought this appeal.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska is a Court of general jurisdiction, civil, criminal, and also shall have admiralty jurisdiction. (Article 53, Chapter 2, Section 1, Compiled Laws of Alaska, 1949.)

The Circuit Court of Appeals, Ninth Circuit, has appellate jurisdiction to review by appeal the decisions of the District Courts of Alaska. (Title 28, United States Code, Judiciary and Judicial Procedure, effective September, 1948, Chapter 83, Section 1291 and Section 1294.)

In the Act of June 6, 1900, jurisdiction of the District Court was made general in "civil, criminal, equity, and admiralty cases", and is the same as that of District Courts of the United States.

Alaska Pacific Fisheries v. Territory of Alaska (1919) 249 U.S. 53, 39 Supreme Court 208, 63 Lawyers Edition 474;

Bruce v. Murray (Circuit Court of Appeals, C.C.A. 9th, 1903) 123 Fed. 366, 59 C.C.A. 494;

Moller v. Moller (1946) 66 Federal Supplement, 507.

ASSIGNMENT OF ERROR NO. I.

THE COURT ERRED IN SUSTAINING THE DEMURRER OF THE DEFENDANT TO THE COMPLAINT OF THE PLAINTIFF UPON THE GROUND THAT THE ACTION HAS NOT BEEN COMMENCED WITHIN THE TIME LIMITED BY THE LAWS OF THE TERRITORY OF ALASKA.

As before stated, the plaintiff seeks to recover against the United States of America, under the authority granted by Title 41 of the United States Code, entitled "Public Contracts", under what is more commonly known as the Contract Settlement Act of 1944, in accordance with the provisions laid down in

Title 28 of the United States Code. The principal question raised by the demurrer is whether plaintiff is entitled to bring this suit under the provisions of Title 41, United States Code, as provided by Section 113b and c (2), which allows a war contractor aggrieved by the findings of the contracting agency to initiate proceedings in accordance with 113b within ninety days after delivery to him of findings by the contracting agency.

Our contention is that the plaintiff is a war contractor and as such is entitled to bring this action within ninety days after delivery to him of the findings of the contracting agency. The policy of the Contract Settlement Act is particularly set out in:

“a. To facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

“b. To assure prime contractors and sub-contractors, small and large, speedy and equitable final settlement of claims under terminated war contracts and adequate interim financing until such settlement.” (Title 41, Section 101, United States Code Annotated.)

Section 1346 of Title 28, United States Code: In suits where the United States is defendant provides, “that the District Courts shall have original jurisdiction concurrent with the Court of Claims of (1) any civil action against the United States for the recovery of any internal revenue tax * * * and (2)

any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of any executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(Title 28, Sec. 1346, U.S.C. 1948.)

The Contract Settlement Act of 1944 provides that “whenever any war contractor is aggrieved by the findings of a contracting agency on his claim, or part thereof, or by its failure to make such findings in accordance with sub-section (a) of this section he may at his election (1) appeal to the Appeal Board in accordance with sub-section (d) of this section; or (2) *bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States District Court, in accordance with Sub-Section (20) of Section 41, Title 28, except that, if the contracting agency is the Reconstruction Finance Corporation or any corporation organized pursuant to Sections 601-617 of Title 15, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any Court of competent jurisdiction in accordance with existing laws.*

(Title 41, Section 113b.)

Title 41, Section 113c (2) provides in Sub-Section 2 that “a war contractor may initiate proceedings in accordance with Sub-Section (b) of this Section (i) within ninety days after delivery to him of the find-

ings of the contracting agency, or (ii) in case of protest or appeal within the agency, within ninety days after the determination of such protest or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with Sub-Section (b) of this Section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim."

(Title 41, Section 113c (2).)

A "war contractor" is defined as: "and the term war contractor means any holder of one or more war contracts".

(Title 41, Section 103c.)

The term "war contract" is defined as: "a prime contract or a sub-contract".

(Title 41, Section 103c.)

The term "prime contract" is defined as: "any contract, agreement, or purchase order heretofore or hereafter entered into by a contracting agency and connected with or related to the prosecution of the war; and the term prime contractor means any holder of one or more prime contracts".

(Title 41, Section 103a.)

The term "sub-contract" is defined as: "any contract, agreement, or purchase order heretofore or hereafter entered into to perform any work, or make or furnish any material to the extent that such work

or material is required for the performance of any one or more prime contracts or of any one or more other sub-contracts; and the term sub-contractor means any holder of one or more sub-contracts”.

(Title 41, Section 103b.)

The term “material” is defined as: “including any article, commodity, machinery, equipment, accessory, part, component, assembly, work in process, maintenance, repair, and operating supplies, and any product of any kind”.

(Title 41, Section 103e.)

The term “government agency” is defined as: “any executive department of the government, or any administrative unit, or sub-division thereof, any independent agency, or any corporation owned or controlled by the United States in the executive branch of the government, and includes any contracting agency”.

(Title 41, Section 103f.)

The term “contracting agency” means: “any government agency which has been or hereafter may be authorized to make contracts pursuant to Section 611 of Appendix to Title 50, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to Sections 601-617 of Title 15, the Small War Plants Corporation and the Secretary of Commerce”.

(Title 41, Section 103g.)

Section 611 of Title 50, Appendix of the U.S.C., enacted December 18, 1941, Chapter 593, Title 2, Section 201, 55 Statutes 839, provides that “the Presi-

dent may authorize any department or agency of the government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make, advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendments, or modifications of contracts whenever he deems such action would facilitate prosecution of the war * * *’.

(Title 50, Section 611.)

Executive Orders coordinating bureau offices, etc., No. 901, is set out in part as follows: “The successful prosecution of the war requires an all-out industrial mobilization in order that the materials necessary to win the war may be produced in the shortest possible time. To accomplish this objective it is necessary that the Departments of the War and the Navy and the United States Maritime Commission cooperate to the fullest possible degree with the Office of Production Management in the endeavor to make available for the production of war material all industrial resources of the country. It is expected that in the exercise of powers hereinafter granted, these agencies and the Office of Production Management will work together to bring about the conversion of manufacturing industries to war production, including the surveying of war potential of industries, plant by plant; the spreading of war orders; the conversion of facilities; the assurance of efficient and speedy

production; the development and use of sub-contracting to the fullest extent and the conservation of strategic materials.

TITLE I.

1. By virtue of the authority in me vested by the Act of Congress, entitled 'An Act to Expedite the Prosecution of the War Effort', approved December 18, 1941, (hereafter called the 'Act') (Sec. 601 et seq. of this Appendix), and as President of the United States and Commander in Chief of the Army and Navy of the United States and deeming that such action will facilitate the prosecution of this war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor, to enter into contracts and into amendments and modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment or modification of contracts * * *.

2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind or any

portion thereof including plans, spare parts, and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment without any restriction of any kind either as to type, character, location or form.”

It follows, therefore, that if, in the year 1941, the War Department was established as a contracting agency by Executive Order to enter into the kinds of contracts referred to above, and the War Department by and through its agent, the Resident Engineer of the United States Army Air Base, entered into a contract with the plaintiff to furnish equipment for the construction of this air base in the year 1942, during the period of the last war, that such a contract is certainly relating to the prosecution of the war, and that the plaintiff, being a holder of such a contract thereby became a war contractor and as such, if he brings his action within ninety days after the delivery to him of findings by the contracting agency of which he is aggrieved, is entitled to the benefit of Section 113b of Title 41. The Statute of Limitations of the Territory of Alaska would, therefore, appear not to be applicable in this case.

Wherefore, appellant prays that the judgment of the District Court as set forth in Assignment of Error No. I, be reversed.

Dated, Fairbanks, Alaska,
October 10, 1949.

Respectfully submitted,

ROBERT A. PARRISH,

Attorney for Appellant.